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AFFIN BANK BHD v. ENERGYPEAK FZE

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
SUPANG LIAN JCA
MOHD NAZLAN GHAZALI JCA
B [CIVIL APPEAL NO: W-04(IM)(NCC)-350-07-2022]
28 NOVEMBER 2023

Abstract – *A garnishee bank is under no obligation to continuously and continually monitor each affected account and to further attach subsequent amounts that may be banked into the account of the judgment debtor with the garnishee bank after the date of the service of garnishee order to show cause ('GOTSC') until the decision of the hearing of the GOTSC. The amount attached as at the date of the service of the GOTSC is 'frozen' and that which is frozen cannot admit of fresh funds nor be depleted of existing funds.*

CIVIL PROCEDURE: *Proceedings – Garnishee – Garnishee order to show cause ('GOTSC') – Whether garnishee has to continue to attach fresh sums of monies coming into judgment debtor account with garnishee bank after service of GOTSC on garnishee – Whether there were fresh sums of monies credited into judgment debtor's account with garnishee bank after service of GOTSC – Whether there could be movement in account once amount attached or 'frozen' – Whether garnishee under obligation to continuously and continually monitor affected account – Rules of Court 2012, O. 49*

The judgment creditor ('JC') had obtained summary judgment against the judgment debtor ('JD') for the sum of RM208,051.20 ('judgment sum'). As allowed under the Rules of Court 2012 ('ROC'), the JC filed an *ex parte* application to garnish the judgment sum from any of the JD's account(s) maintained with the garnishee bank. As required under O. 49 r. 2(a) of the ROC, the JC in the garnishee order to show cause ('GOTSC') must quantify the amount to be garnished as at the date of the said application. The JC served the GOTSC on the garnishee bank. The garnishee replied to the JC, stating that the JD had an account with them with a credit balance of RM9.81 and so this amount was 'attached' until further order that the Sessions Court may make in the garnishee order absolute ('GOA'). Upon hearing the submissions of the parties, the Sessions Court directed the garnishee bank to file a further affidavit to show the amount present in the account from the date of service of the GOTSC and any amount that was credited into the account after the date of service until the date of the show cause hearing. According to the Sessions Court, this direction was given because the amount in the account was lesser than the amount owed. The Sessions Court subsequently held that there was no amount in the account that could be

subjected to an order absolute and thus no order absolute was granted. Dissatisfied, the JC appealed to the High Court. In delivering its decision, the High Court held that the final amount payable by the garnishee to the JC under the GOA made was RM16,640.81, after having satisfied itself that there were three additional sums that had come into the account of the JD with the garnishee bank after the service of the GOTSC on the garnishee bank. The High Court was influenced by the fact that the preposition 'from' in O. 49 r. 3(2) of the ROC that reads 'such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified' would mean that any sums of monies going into the JD's account after the GOTSC was served were to be attached as well. After comparing the relevant provisions in the Civil Procedure Rules ('CPR') of the UK Courts, especially part. 72.6 thereof, where the preposition used was 'at', the High Court concluded that the Malaysian position on garnishment was substantially different from the UK's position such that in Malaysia there was a continuing obligation to the garnishee to continuously and continually attach monies that may be credited into the JD's account after the date of service of the GOTSC. The garnishee sought leave to appeal to the Court of Appeal, which was duly granted. Hence, this appeal. The issues that arose were (i) whether the amount in the garnishee order absolute could include amounts subsequent to the amount outstanding from the garnishee to the JD when the garnishee order to show cause was served on the garnishee; and (ii) whether there were any further sums standing to the credit of the JD after the service of the GOTSC which could be garnished and paid out by the garnishee bank to the JC.

Held (allowing appeal; setting aside order of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) There was no basis to say that the change in preposition from 'at the date' in para. 72.6 of the CPR to 'from the service of the order' in O. 49 r. 3 of the ROC, has the effect of the continuing attachment of all sums paid into the JD's account with the garnishee after the service of the GOTSC whereas under the CPR only the amount as at the date of the service of interim third-party debt order was attached. The sentence construction and structure are totally different, and one must discern if such a change was intended when the language used did not support such a change. (para 31)

(2) Once an amount was attached or 'frozen', there can be no movement in the account, be it of money leaving or being added in. The only exception is when there is a sum of money accruing due from the garnishee to the JD. It is an exception that underscores the rule that ordinarily the GOTSC would not bite on future amounts but the amounts owing as at the date of service of the GOTSC. Therefore, the High Court had erred when it held that the word 'from' used in O. 49

A r. 3(2) of the ROC instead of 'at' meant that Malaysian courts, unlike in the UK, should not take a static approach to determining the amount to be attached and should not be confined only to consider the amount in a judgment debtor's account as at the time the order *nisi* was served upon it. (paras 35 & 52)

B **(3)** When the three cheques were presented to be drawn on the account, the said cheques were returned dishonoured as there was insufficient balance available in the account. The net result was that the garnishee did not receive any monies into the account. By ordering the garnishee to pay the said RM16,000, the garnishee would in fact be making C payment out of its own funds and not from debts due/accruing due from the JD. This was not allowed or permitted under the provisions of O. 49 r. 1 of the ROC. It would be to punish the garnishee bank by ordering it to pay over to the JC monies which was not owing by the garnishee to the JD as there was no amount of RM16,000 standing to D the credit of the JD which the JD could call upon the garnishee bank to pay the JD. (paras 56 & 57)

(4) A GOTSC only attaches debts which the JD himself was free to deal with, in that, the garnishee owed the JD the debts at the time the GOTSC was served. As the account would be overdrawn, any monies E credited/received into the subject account would automatically reduce the overdrawn balance since the said account was in a negative balance. If there was a no positive or credit balance, then there was no debt due from the garnishee bank to the JD that would require the garnishee bank to honour an overdrawn cheque issued by the JD. Correspondingly, F there would be nothing to attach. If there was a positive balance that was still subject to the over-arching principle that the positive balance must be as at the date of the service of the GOTSC. The High Court Judge had erred in law and in fact in holding that the sum of RM16,000 were debts due or accruing due by the garnishee to the JD when in fact the G sum did not belong to the JD in the first place and no debt arose from the garnishee to the JD. Moreover, the GOTSC did not grant the JC judgment debt priority over the monies in an affected account over the rights of the garnishee to the same monies. (paras 61-64)

(5) The garnishee was under no obligation to continuously and continually H monitor each affected account and to further attach subsequent amounts that may be banked into the account of the JD with the garnishee bank after the date of the service of the GOTSC until the decision of the hearing of the GOTSC. The amount attached as at the date of the service of the GOTSC was 'frozen' and that which was frozen could not admit I of fresh funds nor be depleted of existing funds. (para 67)

Case(s) referred to:

Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd [2006] 1 CLJ 197 CA ***(refd)***
Heppenstall v. Jackson and Barclays Bank Ltd [1939] All ER 10 ***(refd)***
Holt v. Heatherfield Trust Ltd And G & T Bridgewater Ltd [1942 1 All ER 404 ***(refd)***
Kian Lup Constructions v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***
Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd [2016] 2 CLJ 717 FC ***(refd)***
Societe Eram Shipping Co Ltd v. Cie Internationale de Navigation And Others [2004] 1 AC 260 ***(refd)***
Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors [2014] CLJU 272 CA ***(refd)***
Top-A Plastic Sdn Bhd & Ors v. Bumiputra Commerce Bank Bhd [2006] 3 CLJ 460 HC ***(refd)***
Transpacc Property Management Sdn Bhd v. Badan Pengurusan Bersama Pangsapuri Aman Larkin & Anor [2022] 9 CLJ 794 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 49 rr. 1, 2(a), 3(2)

Civil Procedure Rules [UK], Part 72.1

For the appelant - Chan Kok Leong, Deborah Lui Shien Mae; M/s Shook Lin & Bok
For the respondent - Lo Chi Wui & Diana Razak; M/s Lo Chambers

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Appeal No: WA-12ANCC-123-09-2021 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng JCA:

[1] It has always been understood that when a Garnishee Order To Show Cause ("GOTSC") is issued and served on a garnishee at the instance of a judgment creditor ("JC"), the sum outstanding from the garnishee to the judgment debtor ("JD") is frozen, such that once the GOTSC is made absolute, the amount garnished and now made absolute, shall be paid out to the JC.

[2] However, in this case, the JC argued that the amount owing from the garnishee to the JD need not be limited to the amount outstanding as at the date of the service of the GOTSC on the garnishee, but that it also would include all sums subsequently owing by the garnishee to the JD.

[3] More importantly, in the case of a current account opened by the JD with the garnishee bank, all amounts paid into the JD's account with the bank from the date of the service of the GOTSC on the garnishee up to the date the Garnishee Order Absolute ("GOA") would be frozen and attached for the benefit of the JC.

[4] Apparently, the basis for the argument of the JC, which found favour with the High Court, is that there is a significant difference between the relevant preposition used in our Rules of Court 2012 ("ROC") as compared to that used in the present Civil Procedure Rules ("CPR") of the UK Courts. The difference, the JC argued, is the difference between "from" in "from the service of the order on him" in O. 49 r. 3 of the ROC and "at" in Part 72.6 of the CPR in "the amount of the balance at the date it was served with the order."

At The Sessions Court

[5] The JC, Energypeak Fze, had obtained summary judgment against the JD, Infinity Global Palm Oil Sdn Bhd, for the sum of RM208,051.20 with interest thereon at the rate of 5% per annum from 30 January 2020 to the date of full settlement and costs of RM3,000 ("the judgment sum").

[6] As allowed under the ROC, the JC filed an *ex parte* application to garnish the Judgment Sum of RM224,304.87 as at 7 May 2021 from any of the JD's account(s) maintained with the garnishee bank, Affin Bank Berhad. As required under O. 49 r. 2(a) ROC, the JC/applicant in the GOTSC must quantify the amount to be garnished as at the date of the said application.

[7] The JC served the GOTSC dated 31 May 2021 on the garnishee bank on 21 June 2021. On 23 June 2021, the garnishee replied to the JC's solicitors stating that the JD has an account with them with a credit balance of RM9.81 and so this amount was "attached" until further order that the Sessions Court may make in the GOA.

[8] The direction of the court for the garnishee to "show cause" by filing an affidavit was duly communicated by the JC's solicitors to the garnishee. The garnishee bank filed its affidavit dated 30 July 2021 ("garnishee's first affidavit") exhibiting the JD's statement of account dated 28 July 2021 ("first statement of account").

[9] Upon hearing the submissions of the parties, the Sessions Court directed the garnishee bank to file a further affidavit to show the amount present in the account from the date of service of the GOTSC and any amount that is credited into the account after the date of service of 18 June 2021 until the date of the show cause hearing. This direction was given, according to the Sessions Court, because the amount in the account is lesser than the amount owed. The Sessions Court then fixed a next show cause hearing date on 6 September 2021.

[10] The garnishee filed a further affidavit ("garnishee's second affidavit") exhibiting the JD's statement of account dated 27 August 2021 ("second statement of account"). At the adjourned hearing date on 21 September 2021, the Sessions Court held as follows:

(a) based on the first statement of account which consisted of the statement on the date of service of the GOTSC and read together with the second statement of account, the Court was satisfied that the garnishee has adhered to the Court's direction which was to show the amount in the account maintained with the garnishee up until 7 days before the show cause date which at that time was fixed on 6 September 2021;

(b) as the balance in the account shown in "Exhibit A-5" (*ie*, the second account Statement) was far less than the costs that the garnishee was entitled to in the show cause proceedings, the Court found that there was no amount in the account that can be subjected to an order absolute; and

(c) no order absolute was granted, and the Court allowed costs of RM300 to the garnishee.

Before The High Court

[11] The JC, being dissatisfied with the decision, appealed to the High Court. On 28 February 2022, the High Court expressed its view that the Sessions Court had erred as the High Court was of the view that a GOA should have been made effective 21 September 2021. The High Court then directed the garnishee to file an affidavit exhibiting the JD's statement of account for the period of 18 June 2021 until 14 September 2021 and it fixed the appeal for continued hearing on 21 March 2022.

[12] The garnishee then on 14 March 2022 filed its affidavit (the garnishee's third affidavit) exhibiting the JD's statement of account dated 10 March 2022 (third statement of account). On 21 March 2022, the High Court delivered its decision and held that the final amount payable by the garnishee to the JC under the GOA made was RM16,640.81, after having satisfied itself that there were three additional sums that had come into the account of the JD with the garnishee bank after the service of the GOTSC on the garnishee bank.

[13] The High Court was influenced by the fact that the preposition "from" in O. 49 r. 3(2) ROC that reads "such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified" would mean that any sums of monies going into the JD's account after the GOTSC was served are to be attached as well.

[14] After comparing the relevant provisions in the CPR especially Part 72.6 thereof, where the preposition used is "at", the High Court concluded that the Malaysian position on garnishment is substantially different from the UK's position such that in Malaysia there is a continuing obligation on the garnishee to continuously and continually attach monies that may be credited into the JD's account after the date of service of the GOTSC.

A **Before The Court Of Appeal**

[15] The garnishee sought leave to the appeal to the Court of Appeal and leave was duly granted. Hence this appeal before us.

[16] Learned counsel for the garnishee argued that the interpretation of the
B cases from the UK courts and from our courts has been that the amount attached is as at the date of the service of the GOTSC and that further amounts that may be paid into the JD's account with the garnishee bank after the service of the GOTSC till the date the GOA is made are not included. Indeed, no cases have been produced that decided otherwise.

C **[17]** The garnishee further argued that O. 49 r. 3(2) ROC where it is stated that "such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified", does not justify the attachment of the further sums that may be credited into the hands of the garnishee bank as the preposition
D "from" qualifies the effective date of the GOTSC which is from the date of service of its order till the GOA is made at which time then, the sum attached is ordered to be paid to the JC.

[18] Related to the above, there is also the question as to whether factually there were any further sums standing to the credit of the JD after the service
E of the GOTSC which could be garnished and paid out by the garnishee bank to the JC.

[19] At the outset of the hearing of this appeal, the parties had informed the court that whatever may be the outcome of the appeal, they had agreed with each other not to ask for costs against the other. This is because the principle
F at stake is far more important than the amount in dispute which is at best a paltry RM16,640.81 and at worst a minuscule sum of RM11.81.

Whether The Amount In The Garnishee Order Absolute Can Include Amounts Subsequent To The Amount Outstanding From The Garnishee To The Judgment Debtor When The Garnishee Order To Show Cause Was Served On The Garnishee

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[20] Essentially, learned counsel for the appellant garnishee bank sought to persuade the court that the High Court had departed from the settled law by holding that the garnishee bank has to continuously and continually attach
H or hold the monies received in the JD's account with the Bank after the service of the GOTSC.

[21] Our ROC was based on the Rules of the High Court 1980 which predecessor was our Rules of the Supreme Court 1957 and their provisions on garnishee were taken from the UK Rules of the Supreme Court 1883
I ("RSC") and in fact are *in pari materia* with the RSC. In the UK there were several amendments to their RSC, but the provisions on garnishee remain essentially the same until the major overhaul of the RSC by the CPR.

[22] The philosophy behind the CPR in the UK was to do away with the use of words that have become archaic even to the English tongue and to draft legislation in plain layman's language. Even the word "garnishee" that few would understand its meaning, has been replaced by the expression "third party debt order". Likewise, a GOTSC is now replaced by an "interim third-party debt order" and a GOA by a "final third-party debt order." Thus, Part 72.1 of the CPR cut through the convoluted mess of words and introduced the subject in these plain words:

> 72.1 (1) This Part contains rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment debtor.

[23] So much for the preference of the plain words to that of the unfamiliar and obscure. With that the creature "garnishee" disappeared, though not its concept now housed under the plain drafting of a "third party who owes the judgment debtor."

[24] We do not think that the concept and scope of a GOTSC has changed with the new CPR drafted in plain language as compared to the more archaic RSC upon which our current O. 49 of the ROC is based. The new CPR shed fresh light on how the old provision on a GOTSC is to be interpreted. The changes are more cosmetic to clarify what could be confusing to the uninitiated.

[25] There are just so many different ways to say the same thing in the English language as in any language. The new CPR in the UK was focusing on what the third party was required to depose in its affidavit and it was clearly stated that it should depose the amount as at the date of the service of the interim third-party debt order.

[26] The emphasis of the old provision in the SCR and in our ROC was on the effective date of the attachment or freezing of the sum due or accruing due from the JD to the garnishee and the expression "from the service of the order on him" in O. 49 r. 3 ROC was used to indicate that nothing could be done to the sum attached or frozen until such further order of the court given after hearing the garnishee in the GOTSC.

[27] In an attempt to simplify the rules, one would focus on what the garnishee or the third party who is a debtor to the JD, is required to do upon being served with the GOTSC. The CPR now makes it explicit that the third party is to file an affidavit stating "the amount of the balance at the date it was served with the order." That would be part of what a garnishee is required to do any way to show cause why the GOA should be made absolute only for the amount of the balance and not for any larger sum as may be asserted by the JC.

[28] Thus, the relevant Part 72.6 of the CPR which deals with the "obligations of third parties served with interim order" reads as follows:

> 72.6
>
> (1) A bank or building society served with an interim third party debt order must carry out a search to identify all accounts held with it by the judgment debtor.
>
> (2) The bank or building society must disclose to the court and the creditor within 7 days of being served with the order, in respect of each account held by the judgment debtor:
>
> (a) the number of the account;
>
> (b) whether the account is in credit; and
>
> (c) if the account is in credit:
>
> (i) whether the balance of the account is sufficient to cover the amount specified in the order;
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> (ii) the amount of the balance **at the date** it was served with the order, if it is less than the amount specified in the order; and
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> (iii) whether the bank or building society asserts any right to the money in the account, whether pursuant to a right of set-off or otherwise, and if so giving details of the grounds for that assertion.
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> (emphasis added)

[29] This is to be contrasted with the more archaic and cumbersome rendering of our O. 49 r. 1 of the ROC which source is traceable to the UK SCR as follows:

> Attachment of debt due to judgment debtor (O. 49 r. 1)
>
> (1) Where a person (who is referred to as "the judgment creditor" in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as "the garnishee" in this Order), is indebted to the judgment debtor, *the Court may*, subject to the provisions of this Order and of any written law, *order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings*.
>
> (emphasis added)

[30] Our O. 49 r. 3 of the ROC reads as follows:

> Service and effect of order to show cause (O. 49 r. 3)
>
> 3. (1) An order under rule 1 to show cause shall, at least seven days before the time appointed thereby for the further consideration of the matter, be served:

(a) on the garnishee personally; and

(b) unless the Court otherwise directs, in the judgment debtors;

(2) Such an order shall bind in the hands of the garnishee as **from the service** of the order on him on **any debt** specified in the order or so much thereof as may be so specified.

(emphasis added)

[31] As can be seen from the comparison and contrast above, there is no basis to say that the change in preposition from "at the date" in para 72.6 CPR to "from the service of the order" in our O. 49 r. 3 of the ROC, has the effect of the continuing attachment of all sums paid into the JD's account with the garnishee after the service of the GOTSC whereas under the CPR only the amount as at the date of the service of interim third party debt order is attached. The sentence construction and structure are totally different and one must discern if such a change was intended when the language used does not support such a change.

[32] What is amended to clarify cannot be argued to change the concept altogether for a mode of execution by way of garnishment. The cases in UK before the amendments introduced by the CPR were all consistent in their understanding of the effect of a GOTSC having the effect of attaching the balance amount standing to the credit of the JD with the garnishee.

[33] It would be reading too much into the amendments to conclude that the CPR now allows only the balance as at the date of the service of the order for the GOTSC to be attached when previously, the amount to be attached had included all further sums paid into the account standing to the credit of the JD with the garnishee until the GOA is made.

[34] An argument from silence is suspect and the risk of concluding that the converse could be true before the amendment is not justified unless there was a clear mischief that was to be addressed. Whilst it is clear now under the CPR as to what the third party debtor is to depose to upon being served with the interim third party debt order, it does not mean in any way that the position prior to the CPR was that there was a continuing obligation to attach further sums of money that may be credited into the JD's account with the garnishee after being served with the GOTSC.

[35] Once an amount is attached or "frozen", there can be no movement in the account, be it of money leaving or being added in. The only exception is when there is a sum of money accruing due from the garnishee to the JD. It is an exception that underscores the rule that ordinarily the GOTSC would not bite on future amounts but the amounts owing as at the date of service of the GOTSC.

[36] Upon hearing the parties the court would make a GOA for the amount sought to be attached and paid out if it is satisfied that there is a sum sufficient to meet the judgment debt or if not sufficient, then such lesser amount as may be owing by the garnishee to the JD. If no sum is owing at all, then the GOTSC would be dismissed.

[37] None of the UK cases that were decided before the new CPR came into force support the proposition that the amount attached as at the date of service on the garnishee of the GOTSC includes further amounts that may be received by the garnishee as payable to the JD. In fact, the cases cited by both the appellant garnishee bank and the respondent JC do not support the proposition that further amounts paid into the JD's account with the garnishee bank after the date of service of the GOTSC could be attached.

[38] In the High Court case of *Top-A Plastic Sdn Bhd & Ors v. Bumiputra Commerce Bank Bhd* [2006] 3 CLJ 460; [2006] 5 MLJ 620 ("*Top-A Plastics*") at pp. 631-632, Ramly Ali J (later FCJ) referred to the English case of *Heppenstall v. Jackson and Barclays Bank Ltd* [1939] All ER 10 ("*Heppenstall*") and held as follows:

> [31] In *Heppenstall v. Jackson and Barclays Bank Ltd* [1939] All ER 10, the court of Appeal (UK) held that the garnishee order only affected debts in existence *at the date of the service thereof and the moneys subsequently paid in could not be subjected to the order*.
>
> [32] Further, in the same case, Scott LJ in delivering the decision had stated that:
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> > All those decisions make it quite clear that a garnishee order *attaches no debts which do not exist at the moment when the order is made and served*, ...
> >
> > ...
>
> [33] In (*Law of Banker and Customer*) (4th Ed) Poh Chu Chai, p 386, the learned author agrees that 'a garnishee order affects a debt due or accruing due to a judgment debtor at the date of the order; *funds which become payable to a judgment debtor after the date of the garnishee order are generally not affected by the order*.'
>
> [34] In the present case, *the defendant had wrongly frozen the said amount of RM98,888.06 which was paid in after the garnishee orders were served on the defendant and the current account of the plaintiff frozen by the defendant. The said amount is not subject to the garnishee orders* and should be paid into a new temporary account so that the plaintiff has the benefit to utilise the amount. This was also not done by the defendant.
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> (emphasis added)

[39] Learned counsel for the appellant garnishee bank also referred us to the Court of Appeal's case of *Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors* [2014] CLJU 272; [2014] 4 MLJ 398 at p. 402 ("*Tiong Hoo Teck*"): A

> [8] The learned judicial commissioner ('JC') allowed the garnishees' application and set aside the said garnishee order. The grounds of decision of the learned JC consisted of two parts. Firstly, he set out in para 4 of his decision the law, which in our view correctly, on what kind of monetary debt that can be garnished under O. 49 r. 1(1) of the RHC: B
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> > [4] ... A garnishee order does not operate to attach the debts which become payable to a judgment debtor after the date of service of the garnishee order. The garnishee order only affect debts in existence at the date of service thereof: *Heppenstal v. Jackson & Barclays Bank Ltd* [1939] 1 KB 585. Further, the debt should be distinctly or clearly identifiable and not be lumped with the debts of third parties so that the debt can be attached and the terms of the garnishee order must be precise: *Bumiputera-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd* [2008] 5 MLJ 34; [2008] 5 CLJ 737 [*sic*]. C D
>
> (emphasis added)

[40] We were also referred to the UK case of *Holt v. Heatherfield Trust Ltd and G & T Bridgewater Ltd* [1942 1 All ER 404 ("*Holt*") cited by the Federal Court in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 717. At 404, it was held that: E

> Upon a review of the cases, the judge has had regard to the fact that a garnishee order can only attach debts which the debtor himself is free to deal with **at the time the garnishee order *nisi* is served**.
>
> (emphasis added)

[41] It has not escaped our notice that the UK cases of *Heppenstall* (*supra*) and *Holt* (*supra*) as applied by our courts were decided before the CPR. The UK judges were interpreting their SCR which provisions on Garnishment found its way into our RHC then. It stands to reason that when interpreting a provision of our ROC which is *in pari materia* with the UK statutes, our courts would apply the interpretation of the UK Courts unless there are local circumstances that justify a departure. F G

[42] Our High Court in this instant case would appear to have departed from the doctrine of *stare decisis* by holding that the UK's position on garnishee proceedings was substantially different from the Malaysian provisions when there are already at least a Federal Court and a Court of Appeal decision binding on the High Court. The High Court saw a distinction in the two different prepositions used in "at" as opposed to "from" but then it is the kind of distinction without a difference where the effect is concerned. H

[43] Depending on sentence construction and syntax, different prepositions may have to be used without altering the substance of the matter nor its core concept. I

[44] The House of Lords in *Societe Eram Shipping Co Ltd v. Cie Internationale de Navigation And Others* [2004] 1 AC 260 at pp. 267-268, briefly alluded to the antiquity of the provision of their SCR on garnishee proceedings going way back to 1854. English, like any language for that matter, evolves with the passage of time, and Victorian English would sound cumbersome and convoluted to the current contemporary English ears, even more so to those who are not native speakers of the language. At pp. 267-268 the House of Lords opined as follows:

> 11 The procedure so established was regulated by the Rules of Court scheduled to the Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77) when that Act took effect, and by *the Rules of the Supreme Court promulgated in 1883 when those replaced them. In each of these codes of rules Order 45 regulated garnishee proceedings. When the rules were revised in 1965 (Rules of the Supreme Court (Revision) 1965 (SI 1965/1776), made under section 99 of the Supreme Court of Judicature (Consolidation) Act 1925)*, Order 45 was substantially reproduced as Order 49. *It is apparent from the terms of rules 1(1) and (2), 3 and 8 of this Order as last amended in 1981 that the nature of the 1854 procedure remained essentially unchanged*:
>
> ...
>
> Service and effect of order to show cause
>
> ...
>
> (2) Such an order shall bind in the hands of the garnishee *as from the service of the order* on him any debt specified in the order or so much thereof as may be so specified.
>
> (emphasis added)

[45] Our O. 49 r. 3(2) of the ROC had been copied from the RSC for no two persons drafting a rule can do so in the exact choice and order of words as follows:

> (2) Such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified.

[46] It may be surmised that the learned High Court Judge was influenced by his reading of *Top-A Plastics* (*supra*) and *Tiong Hoo Teck* (*supra*) as applying the principle in *Heppenstall* (*supra*) only when the account balance standing to the JD's credit is more than the judgment debt sum and the GOTSC is a limited order where the judgment sum is stated and the amount needed to be garnished by the garnishee is clearly stated and restricted to the said amount.

[47] There is no basis to take this narrow approach, as the principle properly stated, applies right across the board irrespective of whether the amount garnished is sufficient or insufficient to meet the judgment debt sum. In fact, the sum to be attached in *Tiong Hoo Teck* (*supra*) appears unlimited in nature as it does not quantify the interests and costs and judgment sum.

There was no impediment to the court making an order for the judgment sum less the small amount paid together with interest and costs to be garnished as follows:

> [1] This is an appeal by the appellant ("the judgment creditor') against the decision of the Kota Kinabalu High Court which set aside the garnishee order dated 18 January 2010 ordering the second and third respondents (the garnishees') to pay to the appellant a sum of RM2,123,056.15 with interest and costs to satisfy the summary judgment sum entered by him against the first respondent ('the judgment debtor') in Kota Kinabalu High Court CS No K22-194 of 2005. The said judgment sum of RM2, 123,056. 15 with interest and costs remained wholly unsatisfied except for a small sum of RM2,950.
>
> ...
>
> [6] On 18 February 2010 the learned senior assistant registrar allowed the judgment creditor's application for a garnishee order as follows:
>
> > IT IS ORDERED THAT the said garnishees do forthwith pay to the said judgment creditor the sum of RM2,123,056.15 and interest and costs ...
> >
> > (emphasis added)

[48] Merely because in *Top-A Plastics* (*supra*) the amount attached is in excess of the judgment debt, that does not derogate from the principle that the amount to be attached is the amount standing to the credit of the JD with the garnishee for so much as does not exceed the judgment debt. It is pertinent to see how the court there treated the amount of RM98,999.06 banked into the JD's account after the service of the GOTSC. The Court highlighted what was wrongly "frozen" at para 28, p. 631, as follows:

> [28] "... At the material time 15 October 1999 to 22 October 1999, the total sum frozen by the Defendant was RM443,019.54 (including the sum of RM98,888.06 banked in after the defendant was served with the garnishee orders). If added together with the fixed deposit accounts sum of RM211,469.12, the total sum was RM655,088.86. **All these sums were frozen by the defendant (from 15 October 1999 to 22 October 1999) just to satisfy the judgment debt of RM40,000 under the Garnishee Orders.**
> (emphasis added)

[49] The court concluded as follows:

> [34] In the present case, the *defendant has wrongly frozen the said amount of RM98,888.06 which was paid in after the garnishee orders were served on the defendant and the current account of the plaintiff frozen by the defendant*. The said amount is not subject to the garnishee orders and should be paid into a new temporary account so that the plaintiff has the benefit to utilise the amount. ... (emphasis added)

[50] As is clear and obvious above, the wrong lies in freezing the amount paid in after the GOTSC was served on the garnishee. It so happened that at the same time the amount frozen was also more than the judgment sum. It was in that context that Ramly Ali J (later FCJ) said:

> [23] In *Law of Dishonour of Cheques* (second Ed) 1999, by AN Sana, the learned author states that:
>
> > As a result of a garnishee order the banker is stopped either absolute or partially from carrying out his obligation to honour his client's cheques. When the banker is informed of the amount required for the satisfaction of the decree in connection with which the order issued, he can honour cheques **as long as he can do so without touching the amount required for meeting the decree** ... transferred to a suspense account and the customer can be allowed to operate on the balance.
> >
> > (emphasis added)

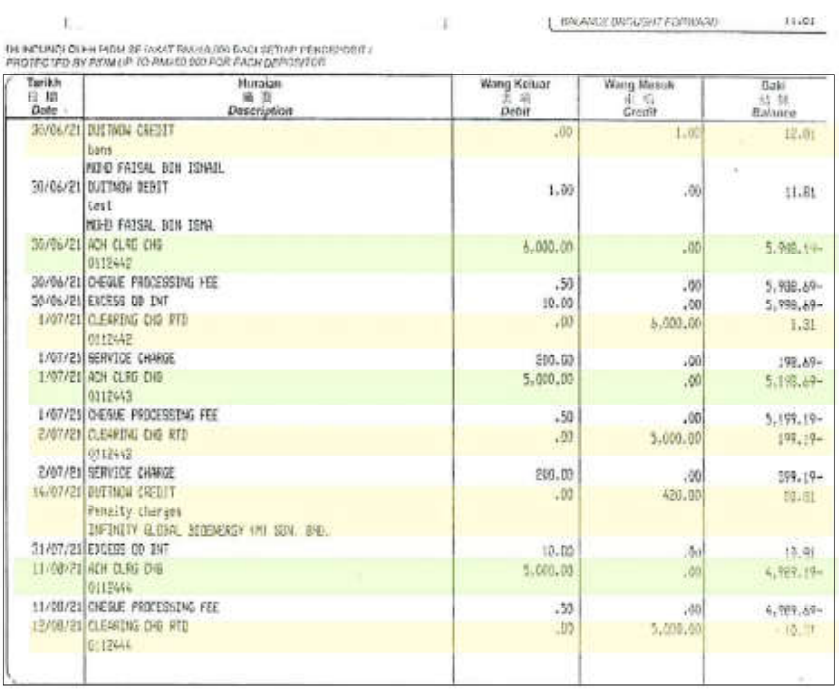
[51] One may draw an analogy in the case of a writ of seizure and sale of the JD's moveable properties that are attached by the bailiff in the JD's home pending a sale by public auction. A list of inventories of the movable properties is itemised by the bailiff and that would not include additional movable properties that may be acquired by the JD whether brought or delivered to the premises or elsewhere simply because it was not there as at the date the writ of seizure and sale was effected.

[52] Therefore, the High Court, with respect, had erred when it held as follows:

> [43] I agree with the Judgment Creditor that the word "at" instead of "from in the English provision indicates that the UK position on garnishment is substantially different from the Malaysian position. In my view, the word "from" used in our O. 49 r. 3(2) ROC 2012 instead of "at" means that Malaysian courts, unlike in the UK, should not take a static approach to determining the amount to be attached and should not be confined only to consider the amount in a judgment debtor's account as at the time the Order *Nisi* was served upon it.

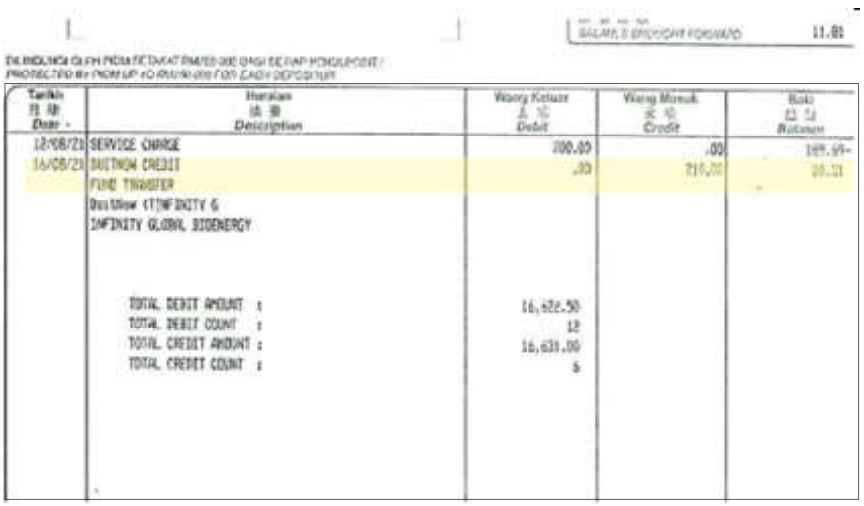
Whether There Were Any Further Sums Standing To The Credit Of The JD After The Service Of The GOTSC Which Could Be Garnished And Paid Out By The Garnishee Bank To The JC

[53] The learned High Court Judge in the hearing of the appeal by the JC had made a finding of fact that there was a sum of RM16,642.81 received into the account of the JD with the garnishee bank from six transactions after 18 June 2021 *ie*, the period between 30 June 2021 until 16 August 2021. Learned counsel for the appellant garnishee highlighted in yellow the six entries in the statement of account in exh. "A-5" of the garnishee's second affidavit as shown below:



BALANCE BROUGHT FORWARD 11.81

Tarikh Date	Huraian Description	Wang Keluar Debit	Wang Masuk Credit	Baki Balance
30/06/21	DUITNOW CREDIT Loan MOHD FAISAL BIN ISMAIL	.00	1.00	12.81
30/06/21	DUITNOW DEBIT Lest MOHD FAISAL BIN ISMA	1.00	.00	11.81
30/06/21	ACH CLRG CHG 0112442	6,000.00	.00	5,988.19-
30/06/21	CHEQUE PROCESSING FEE	.50	.00	5,988.69-
30/06/21	EXCESS OD INT	10.00	.00	5,998.69-
1/07/21	CLEARING CHQ RTD 0112442	.00	6,000.00	1.31
1/07/21	SERVICE CHARGE	200.00	.00	198.69-
1/07/21	ACH CLRG CHG 0112443	5,000.00	.00	5,198.69-
1/07/21	CHEQUE PROCESSING FEE	.50	.00	5,199.19-
2/07/21	CLEARING CHQ RTD 0112443	.00	5,000.00	199.19-
2/07/21	SERVICE CHARGE	200.00	.00	399.19-
14/07/21	DUITNOW CREDIT Penalty charges INFINITY GLOBAL BIOENERGY (M) SDN. BHD.	.00	420.00	20.81
31/07/21	EXCESS OD INT	10.00	.00	10.81
11/08/21	ACH CLRG CHG 0112444	5,000.00	.00	4,989.19-
11/08/21	CHEQUE PROCESSING FEE	.50	.00	4,989.69-
12/08/21	CLEARING CHQ RTD 0112444	.00	5,000.00	10.31



BALANCE BROUGHT FORWARD 11.81

Tarikh Date	Huraian Description	Wang Keluar Debit	Wang Masuk Credit	Baki Balance
12/08/21	SERVICE CHARGE	200.00	.00	189.69-
16/08/21	DUITNOW CREDIT FUND TRANSFER Duitnow (T)INFINITY G INFINITY GLOBAL BIOENERGY	.00	210.00	20.31
	TOTAL DEBIT AMOUNT :	16,402.50		
	TOTAL DEBIT COUNT :	12		
	TOTAL CREDIT AMOUNT :	16,633.00		
	TOTAL CREDIT COUNT :	6		

[54] Upon a careful scrutiny, it is plain that for these three credit items amounting to RM16,000, there were preceded three debit items of the same total amount a day before for each of the entries. We agree with learned counsel for the appellant that there was in fact no monies entering and leaving the account as a result of these transactions that yielded a zero-sum balance.

[55] It was a case of the JD trying to issue three cheques for RM6,000 (on 30 June 2021), RM5,000 (on 1 July 2021) and RM5,000 (on 11 August 2021) when there were insufficient balance/monies in the account. These cheques were subsequently returned dishonoured as there were insufficient funds in the account. The garnishee bank then duly corrected the initial debiting/overdrawing by reversing the same from its systems as seen in the transactions highlighted in yellow dated 1 July 2021, 2 July 2021 and 12 August 2021 – with the remarks "clearing CHQ Rtd".

[56] We accept as both a reasonable and rational explanation that when the three cheques were presented to be drawn on the account, the said cheques were returned dishonoured as there was insufficient balance available in the account which caused the account to be in a state of overdrawn as evident by the symbol "-" appearing after the amount shown under the "balance" column (right side) of the account.

[57] The net result was that the garnishee did not receive any monies into the account. By ordering the garnishee to pay the said RM16,000, the garnishee would in fact be making payment out of its own funds and not from debts due/accruing due from the judgment debtor. This is not what is allowed for or permitted under the provisions of O. 49 r. 1 ROC. It would be to punish the garnishee bank by ordering it to pay over to the JC monies which is not owing by the garnishee to the JD as there was no amount of RM16,000 standing to the credit of the JD which the JD could call upon the garnishee Bank to pay the JD.

[58] There was no sum of RM16,000 that left the account of the JD with the garnishee bank after the service of the GOTSC. It is not unlike a slow-motion recording of the movement of funds within the bank such that when a sum is drawn that sum is moved to the debit column of the account and when it is verified that there is insufficient funds in the account that sum is moved back into the credit column of the account as no funds left the account and any movement was an internal movement within the bank in the processing of the instruction from the JD to its bank as reflected in the three cheques drawn.

[59] It was at most an attempt to overdraw the account and it was not the payment of monies into the account as mistakenly found by the High Court. The "credit" and "debit" entries shown on exh. "A-5" were in fact entries made to reconcile the balance of the account and no monies left the bank from the JD's account after the service of the GOTSC.

[60] There is a further legal dimension to the argument assuming that there was a total sum of RM16,000 paid out to the JC or its mandate. As the JD's account was in a state of overdraft, the garnishee bank effectively is a lender, and the customer JD is a borrower. In such circumstances, the judgment debtor is therefore a debtor to the garnishee, as the monies that were overdrawn from the account must be repaid to the garnishee. See: *Kian Lup Constructions v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32; [2002] 7 MLJ 283 ("*Kian Lup*") where at pp. 51 to 52; pp. 301 to 302, it was observed as follows:

> Generally, a banking institution provides a number of basic financial and advisory services to customers, namely:
>
> ...
>
> (3) financial facility where the bank provides loan or other financial facilities to customers such as *overdraft facilities. In this category, the bank is a lender and the customer is a borrower*.
>
> *As for the third instance, ie where the bank provides a loan or financial facility to the customer, the relationship is also one of a debtor and a creditor. In this case, the bank is a creditor (lender) and the customer is a debtor (borrower).* From the above three scenarios, only the second instance involves a fiduciary relationship between the bank and the customer, while the first and third instances, the relationship between them is merely contractual, ie only as debtor and creditor, not fiduciary.
>
> (emphasis added)

[61] A GOTSC only attaches debts which the JD himself is free to deal with in that the garnishee owes the JD the debts at the time that the GOTSC is served. See: Federal Court in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* (*supra*).

[62] As the account would be overdrawn, any monies credited/received into the subject account would automatically reduce the overdrawn balance since the said account is in a negative balance. If there is a no positive or credit balance, then there is no debt due from the garnishee bank to the JD that would require the garnishee bank to honour an overdrawn cheque issued by the JD. Correspondingly, there would be nothing to attach. If there is a positive balance that is still subject to the over-arching principle that the positive balance must be as at the date of the service of the GOTSC.

[63] With the greatest of respect to the learned High Court Judge, he had erred in law and in fact in holding that the sum of RM16,000 were debts due or accruing due by the garnishee to the JD when in fact the sum do not belong to the JD in the first place and no debt arises from the garnishee to the JD.

[64] Moreover the GOTSC does not grant the JC judgment debt priority over the monies in an affected account over the rights of the garnishee to the same monies. See: The Court of Appeal case of *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd* [2006] 1 CLJ 197; [2006] 1 MLJ 435 at 442 where the Court of Appeal held that a judgment creditor is in effect an unsecured creditor.

[65] The case of *Kian Lup* (*supra*) highlighted that the relationship of the garnishee bank and the JD is effectively a contractual relationship between a banker and customer. That contractual banker-customer relationship between the garnishee and JD existed before the GOTSC was served and for this reason, the garnishee has the right to set off or utilise the sum available towards the settlement of the debts owing by the JD to the garnishee bank.

Decision

[66] We are more than satisfied that the learned High Court Judge had erred when he departed from the well-established position as enunciated in the many cases before the courts including *Top-A Plastics* (*supra*) and more recently in *Transpacc Property Management Sdn Bhd v. Badan Pengurusan Bersama Pangsapuri Aman Larkin & Anor* [2022] 9 CLJ 794; [2022] MLJU 1015 at paras. 28 to 29 that a GOTSC would only attach debts in existence from the garnishee to the JD at the date of service of the GOTSC.

[67] The garnishee is under no obligation to continuously and continually monitor each affected account and to further attach subsequent amounts that may be banked into the account of the JD with the garnishee bank after the date of the service of the GOTSC until the decision of the hearing of the GOTSC. The amount attached as at the date of the service of the GOTSC is "frozen" and that which is frozen cannot admit of fresh funds nor be depleted of existing funds.

[68] We therefore find merits in the garnishee bank's appeal and we would allow the appeal and set aside the order of the High Court. We also allow a GOA to be entered for the sum of RM11.81, which sum was confirmed by the parties as the sum owing by the garnishee to the JD as at the date of the service of the GOTSC.

[69] As agreed beforehand, by both counsel for the parties, there shall be no order for costs of this appeal.